Supreme Court, U.S.
FILED
APR 1 2002

(2)

No. 01-1266

In The

Supreme Court of the United States

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

JANA L. MORTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent respectfully requests that this Court deny United Parcel Service, Inc.'s Petition for A Writ of Certiorari. United Parcel Service, Inc. (hereinafter "UPS") wholly mischaracterizes the Ninth Circuit's holding in this case. The Questions Presented by UPS in its Petition simply were not decided by the Appeals Court and do not merit review by this Court. As to the first question, the Appeals Court did not hold that the possibility of reassigning a job duty to another employee rendered that function non-essential. As to the second question, the Appeals Court did not replace the business necessity defense under Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117 (hereinafter "ADA") with a bona fide occupational qualification test.

The Appeals Court holdings in this case are quite narrow. The Appeals Court held that Morton's requested accommodation would not violate the collective bargaining agreement (hereinafter "CBA") between UPS and its union. The only other holding of the Appeals Court was that the factual record precluded summary judgment. On the issues of essential job functions, reasonable accommodations, and undue hardship, the Appeals Court reviewed the record in the light most favorable to Morton as the nonmoving party and held that there were genuine issues of material fact in dispute. On the issue of business necessity, the Appeals Court found that the record was clearly insufficient to warrant summary judgment.

Because of the fact-specific nature of the Appeals Court holdings in this case and the lack of a fully developed record, it is inappropriate for review by this Court.

The Appeals Court decision is consistent with other circuits, and UPS's concerns regarding the far-reaching implications of the decision are without merit. The nature of the issues makes this case particularly unlikely to resolve significant federal law questions.

STATEMENT OF THE CASE

Jana Morton has a hearing disability. Although she can hear car horns, she cannot understand speech without speech reading. At all relevant times, Morton has held a valid driver's license issued by the State of Arizona. Pursuant to federal and state law, she is qualified to drive vehicles that weigh less than 10,001 pounds.[1] Morton has regularly driven cars, vans, and trucks for many years. Pet., App. 2a-3a.

In 1992, Morton began her career at UPS in Phoenix, Arizona. She accrued seniority by loading and unloading vehicles and sorting packages, and she achieved special recognition on four occasions for outstanding work. Pet., App. 2a. By the fall of 1994, Morton had earned sufficient seniority at UPS to become eligible for promotion to a package car driver position. This job meant more hours and greater earning potential. Promotion to a package car

[1] The United States Department of Transportation (hereinafter "DOT") regulation contains physical qualification standards that only apply to commercial motor vehicles that weigh 10,001 pounds or greater. *See* 49 C.F.R. § 390.5; 49 C.F.R. § 391.41(b). These vehicles are referred to as DOT vehicles. Vehicles that weigh less than 10,001 pounds are referred to as non-DOT vehicles.

driver position was the path that nearly all UPS employees took to advance within the company. Pet., App. 2a.

UPS employs package car drivers who can be categorized into two groups. Drivers with the greatest seniority drive the same, fixed route every day – these senior package car drivers are also called bid drivers. New package car drivers and drivers with less seniority work for a number of years covering fluctuations and spikes in delivery volume, as well as filling-in for bid drivers who are on vacation or out sick. Package car drivers in this second group are called swing drivers. When there is insufficient work to occupy swing drivers, UPS assigns them to non-driving work, such as warehouse work. Pet., App. 3a-8a.

Swing drivers earn seniority as package car drivers. They can continue indefinitely until they attain sufficient seniority to bid on a permanent, fixed route meeting their specific needs. Conversely, UPS employees would never even begin to earn seniority to bid on a permanent, fixed route if they were not promoted to package car drivers and permitted to work as swing drivers. Pet., App. 3a-8a.

Based on her seniority and her supervisor's encouragement, Morton applied for the promotion to become a package car driver. C.A. Excerpts 003, 015, 022, 061-062. Morton passed the road safety test administered by UPS. She also passed UPS's written driving test. Pet., App. 3a. UPS sent her to take a physical exam. As part of the exam, Morton's hearing was tested. The medical examiner told Morton that she could probably drive the small vans or the shuttles for UPS; however, he found Morton

"medically unqualified" to obtain DOT certification. C.A. Excerpts 047, 085, 161.

Morton arranged a meeting with her supervisor and requested that she be permitted to drive non-DOT vehicles as a reasonable accommodation.[2] She described the meeting at which she specifically identified a reasonable accommodation that would allow her to work as a driver:

> UPS turned me down and I didn't understand why. So I looked at all these different size of trucks, and so I drew all of them out. And I said, " . . . I want to know the names of the sizes of these trucks." And so [Mary Scollard, Ms. Morton's UPS supervisor] said, "Sure." So she drew in here what they were. And I said, "Fine. You know, why can't deaf people drive these smaller ones? . . . " And she wrote . . . its not related to DOT. Those aren't regulated by DOT. And I thought, then why can't deaf people drive them? "Why don't you tell UPS that I can drive one of these trucks." And they [UPS] said, "No. They turned it down." . . . They said I couldn't drive any of these.

Pet., App. 3a; C.A. Excerpts 052-054, 063. UPS rejected Morton's proposed accommodation. Pet., App. 3a. It is

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[2] UPS utilizes both non-DOT and DOT vehicles to cover its business needs. UPS's own records indicate that the non-DOT vehicles at the Phoenix facility ranged in weight from 4,100 with most non-DOT vehicles weighing 9,000 pounds, contrary to UPS's assertion in its Petition that the non-DOT vehicles weighed 9,600 pounds. Pet., p. 28; C.A. Excerpts 077; C.A. Supp. Excerpts 0057. According to UPS, non-DOT vehicles get better gas mileage than DOT vehicles and are more economical to operate. There are approximately 33 non-DOT vehicles in Phoenix.

undisputed that UPS never made any effort to engage in good faith in an interactive discussion regarding reasonable accommodation for Morton. Pet., App. 12a. UPS never did involve the union to consider Morton's request for accommodation, as required by the CBA. C.A. Excerpts 146-147.

UPS rejected Morton for the package car driver position based solely on her hearing disability.[3] Pet., App. 6a. After denying Morton the job, UPS hired package car drivers who had less years of seniority than Morton. Due to UPS's refusal to promote her, Morton left employment with UPS. C.A. Excerpts 026.

REASONS FOR DENYING THE WRIT

I. UPS Does Not Seek Review Of The Holding That Morton's Requested Accommodation Would Not Violate The CBA.

The Appeals Court determined that the "focus of the district court opinion was its holding that no reasonable accommodation was available within the terms of the collective bargaining agreement." Pet., App. 6a. On this issue, the Appeals Court reversed and remanded, holding that neither the CBA nor UPS's seniority system prohibited UPS from assigning Morton to swing driver work in a non-DOT vehicle.

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[3] UPS initially contended that the DOT regulation prevented it from allowing Morton to drive any of its trucks or vans. The district court rejected this argument, and UPS has abandoned this defense.

Under the terms of the CBA in effect in 1995, UPS had unlimited discretion in the assignment of vehicles and in the assignment of work to swing drivers with one exception; UPS and the union "agree[d] to abide by the provisions of the Americans with Disabilities Act." Pet., App. 7a; C.A. Excerpts 146. Because swing drivers had no rights or privileges with respect to their assignments, UPS could assign swing drivers "to whatever they want to assign them," regardless of the driver's seniority, without violating the CBA. C.A. Excerpts 142. In addition, under the terms of the CBA, the assignment of vehicles was solely within UPS's discretion. Package car drivers, regardless of their seniority, had no rights or privileges with respect to the assignment of vehicles. UPS could and did change the selection and size of the vehicle assigned on even the most senior package car driver routes without violating the CBA. Pet., App. 3a-8a; C.A. Excerpts 134-144.

The Appeals Court determined that the CBA allowed for accommodation of Morton, holding that "the requirements of the collective bargaining agreement in no way conflict with the accommodation *actually requested by Morton* – employment as a swing driver of only non-DOT vehicles." Pet., App. 7a (emphasis added). This is the only issue fully developed and decided by the Appeals Court, and UPS has not sought review of this issue. Consequently, this Court should deny UPS's Petition for a Writ of Certiorari.

II. Disputes Of Material Fact As To The Essential Functions Of The Job, Reasonable Accommodation, And The Undue Hardship Defense Do Not Raise Important Federal Questions.

A. UPS Mischaracterizes The Appeals Court's Analysis.

UPS's formulation of the Appeals Court's holding in its first Question Presented does not accurately portray the decision. The Appeals Court did not hold that a job duty was not essential if an employer could "in theory" reassign the duty to other employees. Rather, the Appeals Court held, "The record contains conflicting evidence as to whether the ability to drive UPS's larger trucks is an essential function of the package car driver position." Pet., App. 9a-10a.

In support of its request for review by this Court, UPS incorrectly infers that the Appeals Court erred because it failed to accord "great weight" or a "high degree of deference" to the employer's view of what job functions are essential. Pet. 17-18. The Appeals Court considered the conflicting evidence in the record, including UPS's evidence. The statute provides:

> [C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and that if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8). The Appeals Court cited to 29 C.F.R. § 1630.2, which identifies seven non-exclusive factors that

may serve as evidence of whether a particular aspect of a job is an essential function.

Further, UPS argues that the Appeals Court "all but ignored UPS's views regarding the essential functions of the package car position." Pet. 17. UPS disregards the standard of review for summary judgment. On appeal of summary judgment, an appeals court must review the evidence and make permissible inferences in favor of the appellant. *See Stone v. City of Mount Vernon*, 118 F.3d 92 (2d Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998) (reversing a grant of summary judgment for an employer where the district court had placed undue weight on the employer's judgment relating to the essential functions of the position sought); *Gillen v. Fallon Ambulance Service*, 2002 WL 398480 (1st Cir. March 19, 2002) (reversing a grant of summary judgment for an employer on the basis that an employer's view of what a job entailed was not dispositive); *Ward v. Massachusetts Health Research Inst., Inc.*, 209 F.3d 29, 32 (1st Cir. 2000) (holding that employer's view of job requirements was only one factor in the analysis of the essential job functions). The Appeals Court concluded that UPS had not met its burden given that Morton submitted evidence to create a material issue of fact on the issue.

UPS contends that the Appeals Court "predicated its essential functions ruling entirely on its perception that UPS *could* create a new 'non-DOT-certified swing driver position.' " Pet. 13; Pet., App. 11a (emphasis added). Again, UPS seriously misreads the Appeals Court holding. Contrary to UPS's assertions, neither creating new jobs nor reassignment were even addressed as issues by the Appeals Court. What the Appeals Court did state was

that, on the record before it, there were controverted factual issues that could lead a jury to find "both that a driver without DOT certification could perform the essential functions of the swing driver job with accommodation, and that the accommodation was not unduly burdensome." Pet., App. 9a. This genuine issue of material fact cannot be resolved on a motion for summary judgment.

B. The Disputed Factual Issues Should Be Resolved At Trial, Not Reargued By UPS On A Petition For A Writ Of Certiorari.

In the Appeals Court, UPS raised both an essential function argument (that Morton could not do the job because UPS required all drivers to have DOT certification) and a reasonable accommodation argument (that Morton's requested accommodation to drive non-DOT vehicles posed an undue hardship) as alternative grounds to support its summary judgment. The Appeals Court found conflicting evidence on these material issues of fact from which a jury could find in favor of Morton, but the Appeals Court did not decide these issues in favor of Morton. Rather, in reviewing the summary judgment record, the Appeals Court remanded the case for further development of the record and trial.

The essential functions of a job, the reasonableness of an accommodation, and undue hardship all present classically fact-intensive inquiries inappropriate for determination on summary judgment. The Appeals Court decided that there were genuine issues of material fact in dispute as to whether it would be possible to keep a swing driver fully occupied with driving assignments on

non-DOT vehicles, noting that UPS modifies routes and vehicle assignments "from day to day 'to meet delivery needs.' " Pet., App. 5a. In addition, the Appeals Court concluded, "The evidence tends to show that a swing driver operating only non-DOT vehicles would be occupied full time servicing the assigned route using non-DOT vehicles. . . . " Pet. App. 10a. Finally, the Appeals Court held that there was undisputed evidence in the record that overflow work was a component of the work performed by swing drivers and that under the CBA, swing drivers performed overflow work or warehouse work whenever there was insufficient driving work. Pet., App. 11a. The record also contained evidence that UPS does not require all of its package car drivers to obtain DOT certification.[4]

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[4] The evidence in the record indicated that DOT certification, as determined by UPS's own practices and protocols, is not an essential job function. Specifically, UPS's Driver Reasonable Accommodation Protocol provides:

> In the past, UPS has maintained a policy that if a driver failed any part of the D.O.T. physical, that driver would be prevented from operating a UPS vehicle. With the passage of the Americans with Disabilities Act (ADA), UPS took a closer look at that policy and is now implementing a new protocol that may allow certain D.O.T. disqualified drivers the opportunity to operate specific UPS vehicles.

The protocol, which applies to driver candidates with insulin-treated diabetes and visual impairments, is considered by UPS to be "an individualized assessment of the employee's medical condition as it relates to reasonable accommodation under the ADA." UPS determined that drivers with disabilities who could not obtain DOT certification were nevertheless qualified to be package car drivers with the accommodation of operating only

Focusing on the plain language of the ADA concerning "undue hardship" and the factors delineated in the statute, the Appeals Court concluded that the ADA places the burden on employers to prove undue hardship. *See* 42 U.S.C. § 12111(10); 42 U.S.C. § 12112(b)(5)(A). The Appeals Court determined that " . . . [t]he degree of the 'difficulty' of accommodating Morton – a central inquiry in an undue hardship analysis – is . . . very much disputed, and UPS presents essentially no concrete evidence regarding the 'expense' of accommodating Morton, either absolutely or in light of its own 'size and resources' (which are obviously both quite large)." Pet., App. 14a.

UPS's Petition for a Writ of Certiorari should be denied because the essential functions of the package car position, the reasonableness of Ms. Morton's accommodation request, and UPS's claim of undue hardship, all raise genuine issues of material fact that cannot be resolved on the existing record.

C. The Ninth Circuit Analysis Is Consistent With That Of Other Circuits.

The Appeals Court's reversal of summary judgment based on material factual disputes about the essential functions of the job is unremarkable. As other appeals courts have held, determining the essential functions of a job requires a case-specific, factual analysis. *See Kiphart v.*

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non-DOT vehicles. The record also included evidence of specific UPS employees with disabilities who UPS had assigned to non-DOT vehicles as a reasonable accommodation. Pet., App. 3a, 36-37a; C.A. Excerpts 089, 092-94, 146-147.

Saturn Corp., 251 F.3d 573, 585 (6th Cir. 2001) (Sixth Circuit holding that a reasonable jury could conclude that an employer's requirement that all employees be "fully functional/fully rotational" was not an essential job function); *Gillen*, 2002 WL at *9 (First Circuit holding that "the complex question of what constitutes an essential job function involves fact-sensitive considerations and must be determined on a case-by-case basis); *Ward*, 209 F.3d at 35 (First Circuit holding that genuine fact issues existed as to whether a regular and predictable schedule was an essential function of employee's data entry clerk position and that employer, who had better access to relevant evidence, bore the burden of proving that a given job function was essential); *Stone*, 118 F.3d at 99-100 (Second Circuit holding that the district court erred in granting summary judgment for the employer where there were genuine issues of material fact in dispute as to the essential functions of a firefighter position); *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001) (Third Circuit holding that the district court erred in granting summary judgment for the employer because a genuine issue of material fact existed as to whether climbing was an essential function of a cable installer job and therefore whether the employee was qualified).

The difference in the reasoning of the Appeals Court in *Morton* as opposed to the reasoning of certain cases cited by UPS is apparent at first glance. Unlike Morton, those employees sought accommodations that relieved them of performing essential job functions at all. In *Emerson v. N. States Power Co.*, 256 F.3d 506 (7th Cir. 2001), the plaintiff requested an accommodation that would relieve

him of answering emergency phone calls regarding gas leaks. The Seventh Circuit reasoned that to be an essential function because the consequences of not answering the calls would be dangerous. *Id.* at 513. In *Frazier v. Simmons*, 254 F.3d 1247 (10th Cir. 2001), the Tenth Circuit held that the essential functions of a corrections investigator included carrying a firearm, arresting people, and backing up a partner and that it was not reasonable to relieve the plaintiff of those duties and assign them to one of only two other investigators.

Unlike the plaintiffs in *Emerson* and *Frazier*, Morton has not requested an accommodation to relieve her of any essential functions; she is willing and qualified to perform the same work as other drivers – drive the delivery routes UPS assigns her and perform warehouse work when no driving work is available. A more important difference between Morton and the plaintiffs in *Emerson* and *Frazier* is that Morton is simply requesting use of existing equipment to accommodate her disability and allow her to perform driver assignments. She asks UPS to allow her to drive non-DOT vehicles. While the employers in *Emerson* and *Frazier* could not control when emergency gas leaks or crimes would occur, assignments of vehicles and routes and flexibility in day-to-day operations are completely within UPS's ability and control.

Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001) is also inapposite. Unlike Basith, who argued that delivery of medicine was not essential to his pharmacy position, Morton does not argue that delivery of packages is not an essential function of the package car driver position. While Basith asked that other hospital employees deliver medicine, Morton is not asking other package car drivers

to deliver packages. The Seventh Circuit was concerned with whether reassignment rendered a particular job function non-essential. The Ninth Circuit was not faced with a reassignment issue in this case.

Neither *Emerson*, nor *Frazier*, nor *Basith* offer support for UPS's "conflict in the circuits" argument.[5] All that the

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[5] UPS cites other easily distinguishable cases. In *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001), the First Circuit held that a nurse who could not lift 50 pounds failed to identify a reasonable accommodation. The nurse asked that her employer create a new position, which the appeals court determined was not required under the ADA. Morton did not ask for a new position. In *Burch v. City of Nacogdoches*, 174 F.3d 615 (5th Cir. 1999), the Fifth Circuit dealt with a firefighter with a back injury who could no longer perform the essential functions of his job – fighting fires. In addition, no permanent light duty jobs were available because the city operated a very small fire department. This compares with UPS's size and resources, "which are obviously both quite large." Pet., App. 14a. In *Bratten v. SSI Servs., Inc.*, 185 F.3d 625 (6th Cir. 1999), the Sixth Circuit found that the only accommodation identified by the employee was requiring co-workers to perform as much as 20 percent of his job. Morton's requested accommodation-driving non-DOT vehicles – did not involve reassignment of her duties to fellow employees. In *Heaser v. Toro Co.*, 247 F.3d 826 (8th Cir. 2001), the Eighth Circuit held that the employee failed to show that the accommodation she requested was technically possible. UPS has successfully implemented the very accommodation that Morton requested. In *Champagne v. Servistar Corp.*, 138 F.3d 7 (1st Cir. 1998), the First Circuit found that the reasons for terminating an employee who asked to avoid route rotation were legitimate and not a pretext for discrimination. The employee had falsified DOT log books, getting paid for hours he did not work. In *Laurin v. Providence Hospital*, 150 F.3d 52 (1st Cir. 1999), the First Circuit found that a hospital had always required all non-senior nurses to rotate shifts, and it had never made an exception. The hospital had

cases cited by UPS demonstrate is that the courts of appeals consistently apply the ADA to fact-specific inquiries and consider all relevant evidence to determine the essential functions of the job, reasonable accommodations, and undue hardship. Lacking a conflict in the circuits, no reason remains for granting review of the Appeals Court decision.

III. Disputes Of Material Fact Regarding Business Necessity Do Not Raise Important Federal Questions.

A. UPS Mischaracterizes The Appeals Court's Business Necessity Analysis.

Contrary to UPS's statement that "The Ninth Circuit below adopted the 'bona fide occupational qualification standard,' " the Appeals Court expressly stated that "there is no bfoq defense as such under the ADA." Pet. 21; Pet., App. 23a. Citing the "threshold requirement"of the ADA, the Appeals Court said that an employee must be "qualified," i.e., able to perform the essential functions of the job with or without reasonable accommodation. Pet., App. 23a. The Appeals Court specifically stated that

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engaged in the interactive process in a good faith attempt to locate a non-rotating position. In contrast, UPS reasonably accommodated driver candidates with disabilities other than hearing loss, and UPS admitted that it did not engage in the interactive process with Morton or consult the union regarding her accommodation request. Finally, in *Malabarba v. Chicago Trib. Co.*, 149 F.3d 690 (7th Cir. 1998), the Seventh Circuit held that an employer was not required to create a new, permanent, light-duty position for an employee with a disability. Morton has made no such request.

UPS "must show that its standard, *'as used by the covered entity,* is . . . job – related for the position in question and is consistent with business necessity.' " Pet., App. 27a. Given the material issues of fact in dispute, the Appeals Court concluded that UPS had not met its burden.

In arguing "business necessity" without analysis of whether a qualification standard is job-related and can be reasonably accommodated, UPS takes portions of the business necessity defense out of context and ignores both the preceding and the succeeding terms in the statutory language. The ADA provides that:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability *has been shown to be job-related and consistent with business necessity, and that such performance cannot be accomplished by reasonable accommodations,* as required by this subchapter.

See 42 U.S.C. § 12113(a) (emphasis added).

The record did not support UPS's business necessity defense, and regardless, UPS failed to establish the other two elements of the defense on summary judgment: that its asserted qualification standard was job-related and that no reasonable accommodation was possible. The Appeals Court found, "UPS conceded below . . . that it had never itself undertaken any independent study or determination of the appropriateness of applying the DOT hearing standard to non-DOT vehicles." Pet., App. 26a. Rejecting UPS's unsupported argument that safety concerns made DOT certification a business necessity, the

Appeals Court recognized that there was "evidence in the record regarding a DOT finding that non-DOT commercial vehicles 'generally pose no greater safety risk than other vehicles of similar or lesser weight.' " Pet. App. 28a-29a. *See* 53 Fed. Reg. 18,042 (1988).[6] This evidence negated "any conclusion that all or substantially all deaf drivers present a heightened risk of accidents." Pet., App. 28a.

The evidence in the summary judgment record supports Morton's qualifications to safely and successfully perform as a UPS package car driver. Nonetheless, UPS repeatedly implies, without any grounds, that all drivers with hearing disabilities, including Morton, are unsafe on the roadways.[7] This is the very nature of the

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[6] UPS's attempt to expand the application of the DOT regulation to cover lightweight vehicles was considered and rejected by DOT itself. Between 1985 and 1988, UPS urged DOT to expand the application of the physical qualification standards to include lightweight vehicles. BMCS Docket No. MC-114; Notice 85-1, p. 4 of Comments of United Parcel Service, 1985. DOT concluded that while it did have the authority to regulate lightweight vehicles in the interest of safety, such regulation was not merited. *See* 53 Fed. Reg. 18,042 (1988).

[7] The after-the-fact basis upon which UPS attempts to base its safety argument derives from the proffered testimony of its expert Kenneth Pierson. Morton moved to strike Pierson's testimony as impermissible under Federal law, contending that he was not competent to offer testimony that he attempted to give. *See* C.A. Appellant's Supp. Excerpts 01-04, 11-15. Morton's objection and motion to strike Pierson's declaration and other evidence submitted through him were held to be moot by the district court, but now have been remanded for consideration by the Appeals Court. Pet., App. 28a. Morton reasserts her objection to Pierson's declaration and the evidentiary matter

stereotypical, prejudicial misconception that Congress made unlawful under the ADA. The First Circuit examined an employer's stereotypical assumptions in *Gillen*, 2002 WL at *12 and concluded that factual issues existed as to whether an emergency medical technician applicant with one functioning arm could safely perform essential functions of the job with reasonable accommodation. Therefore, a trial was necessary to decide whether the employer acted on an illegal stereotype as opposed to an adequate assessment of the employee's capabilities. The First Circuit stated:

> Of course, an employer cannot insulate itself from liability under the ADA merely by asserting its belief that a prospective employee's known disability will limit her ability to perform a particular job to such an extent as to disqualify her from employment. Even if the employer's belief is honestly held, on particular facts a jury still might conclude that it rested on an unfounded, stereotype (and, therefore, constituted discrimination).

Id. 2002 WL at *13.

For purposes of summary judgment, UPS's stereotypical, unsupported assumptions of Morton's ability to drive safely did not satisfy its burden of establishing no dispute of material fact that its asserted qualification standard was job-related or that Morton could not perform the job with reasonable accommodation. Therefore,

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which UPS attempts to introduce through him. UPS improperly continues to cite the Pierson material (Pet. fn. 3) and argues the safety issues derived from it, without reference to the objections and the fact that it has not been deemed admissible.

the Appeals Court correctly held that there were genuine issues of material fact in dispute as to whether UPS had a business necessity to exclude Morton from the package car driver position.

B. The Ninth Circuit's Application Of The Business Necessity Defense Is Not Inconsistent With The Analysis Of Other Circuits.

The Appeals Court's application of the business necessity defense in *Morton* does not differ from the application of the defense in other cases. Like other circuits, the Appeals Court properly applied the statutory language regarding job-relatedness and business necessity. It applied no more stringent a test than other circuits, but simply required that UPS's asserted qualification standard relate to Morton's ability to perform the position in question when considering reasonable accommodation.

For example, in *Hamlin v. Charter Township of Flint*, 165 F.3d 426, 428 (6th Cir. 1999), the Sixth Circuit examined an ADA claim by a firefighter unable to perform strenuous physical activities. The Sixth Court stated that an employer cannot use physical qualification standards unless those standards are "job-related for the position in question and . . . consistent with business necessity." *Id.* at 430. The Sixth Court specifically decided that the " 'clear import' of 42 U.S.C. § 12112(b)(6) of the ADA 'dictates that employers bear the burden of proving that a challenged job requirement is "job related." ' " *Id., citing Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996).

Likewise, in examining the qualification standard for a telephone service technician, the Eighth Circuit held, "An employer urging a business necessity defense must validate the test or exam in question for job-relatedness to the specific skills and physical requirements of the sought-after position." *Belk v. Southwestern Bell Telephone Co.*, 194 F.3d 946, 951 (8th Cir. 1999) (*quoting* 42 U.S.C. § 12112(b)(6). UPS misstates the Eighth Circuit ruling in *Belk*. The key holding in *Belk* is that an employer is entitled to raise the business necessity defense regardless of whether the employee's ADA claim is based on disparate impact or disparate treatment.

Tate v. Farmland Industries, Inc., 268 F.3d 989 (10th Cir. 2001), is also distinguishable from Morton's case. There, the Tenth Circuit concluded that an employee who was taking anti-seizure medication was not qualified to operate a DOT vehicle governed by the DOT regulation and the DOT Medical Advisory Criteria. The employee only wanted to drive a DOT vehicle and suggested no means of reasonable accommodation. In contrast, DOT does not prohibit Morton from operating UPS's non-DOT vehicles, and therefore, unlike the employer in *Tate*, UPS cannot rely on the DOT regulation as a defense when the DOT regulation simply does not apply to vehicles under 10,001 pounds.

Consistent with this Court and other circuits, the Appeals Court recognized a transportation employer's interest in hiring safe drivers. Pet, App. 30a. Within the framework established by the ADA, the Appeals Court placed the burden on UPS to show that the statutory defense relating to its asserted qualification standard – that screened out drivers with hearing disabilities – was

job-related and consistent with business necessity after taking into account reasonable accommodation. *See* 42 U.S.C. § 12113. Such a holding is fact-intensive, and, as a result, this case does not create a conflict within the circuits or present important federal questions.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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April 1, 2002